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The decision of the court is salutary, in harmony with the purposes of the Act, and in accord with English decisions bearing on similar statutory enactments.<sup>23</sup>

**EFFECT OF ENDORSEMENT BY INFANT.**—The endorser of a negotiable instrument by his act of endorsement obligates himself on contract to pay subsequent holders under given contingencies and at the same time transfers to his endorsee title to the instrument.<sup>1</sup> Where, however, the endorser is an infant, the dual result is modified because of the general unwillingness of the law to hold a minor to his obligations. Consequently, text writers agree that an infant endorser at common law is not liable to subsequent holders on his contract, because, as in the case of other infant contracts,<sup>2</sup> the promise must be regarded as voidable.<sup>3</sup> With regard to the attempt to transfer title, it has been intimated that at common law the endorsement of an infant is a void act,<sup>4</sup> but the decisions prove that it is effective as a passing of the property to the extent of allowing a holder to sue the maker at least until the infant avoids.<sup>5</sup> A disaffirmance, however, would be a good defense to a suit brought by any holder subsequent to the infant

<sup>23</sup>The English law contains statutory enactments similar in tenor to those involved in this case. See Ry. & Can. Traf. Act, 1854 (17 & 18 Vict. c. 31) § 2; Regulation of Rys. Act, 1875 (36 & 37 Vict. c. 48) §§ 3, 6, directing that "every railway . . . company shall, according to their respective powers, afford all reasonable facilities" to the shipper. This section has been held to empower the Railway Commission to order the proper maintenance of existing facilities, *Winsford Local Board v. Cheshire Lines Comm.* (1890) 24 Q. B. D. 456, if the railway has legal power to perform the order, *Arbroth v. Caledonian Ry.* (1898) 10 Ry. & Can. Traf. Cas. 252, 257, and no unreasonable financial expenditure is involved, *Sussex Co. Council v. London etc. Ry.* (1892) 8 Ry. & Can. Traf. Cas. 17, 28, but does not seem to authorize the Commissioners to order a railway to acquire facilities which it does not possess. See *Southeastern Ry. v. Mayor of Hastings* (1881) 6 Q. B. D. 586, 591. It appears, though the point is undecided, that the Railway Commissioners have not the power asserted by the Interstate Commerce Commission in *United States v. Pennsylvania R. Co.*, *supra*. See *Spillers & Bakers Ltd. v. Gt. N. Ry.*, *supra*; *Caledonian Ry. v. Lanarkshire Ass'n.* (1911) 27 T. L. R. 221; *Innes v. London etc. Ry.* (1875) 2 Ry. & Can. Traf. Cas. 155, 165.

<sup>1</sup>Norton, *Bills & Notes* (4th ed.) § 65.

<sup>2</sup>Tiffany, *Persons* (2nd ed.) 388.

<sup>3</sup>Norton, *op. cit.* § 94; Tiedeman, *Commercial Paper*, § 49; Daniel, *Negotiable Instruments* (6th ed.) § 228.

<sup>4</sup>See *Roach v. Woodall* (1891) 91 Tenn. 206, 18 S. W. 407. One authority has stated that § 22 [N. Y. § 41] of the Negotiable Instruments Law, which seems to make such endorsements voidable, changes the common law. Crawford, *Negotiable Instruments Law*, § 41. By reason of the citation of this case as declaratory of the common law view, his statement may be construed to mean that he regards such endorsements as void at common law. But see note 16, *infra*.

<sup>5</sup>*Nightingale v. Withington* (1818) 15 Mass. 272; *Hardy v. Waters* (1853) 38 Me. 450; *Frazier v. Massey* (1860) 14 Ind. 382; so also where the infant endorses for a partnership. *Dulty v. Brownfield* (1845) 1 Pa. 497. Suit lies by the holder of a bill of exchange under such circumstances against the drawer, *Grey v. Cooper* (1782) 3 Doug. 65, or acceptor. See *Jones v. Darch* (1817) 4 Price, 300.

against either maker or any prior holder.<sup>6</sup> That the infant may avoid and revest title in himself as against his own endorsee has been often affirmed by writers on the subject without citation of decisions,<sup>7</sup> probably on the analogy of transfers of other property,<sup>8</sup> but there is some confusion as to whether this could be done if the note had passed by purchase from the infant's endorsee to a holder without notice.<sup>9</sup> In case payment had been made by the maker to a *bona fide* purchaser from the infant before disaffirmance, it would seem that the maker would be liable after the avoidance again, this time to the infant,<sup>10</sup> since such avoidance makes the transaction void *ab initio*.<sup>11</sup> The maker might, after payment to the minor, look himself to the holder on the ground of failure of consideration, but the fact that he warrants the payee's capacity<sup>12</sup> would create an estoppel and prevent even this remedy if the infant were the payee. Indeed, this same warranty should allow a holder to make himself whole against the maker if an infant payee disaffirms his endorsement and fails to return the consideration.<sup>13</sup>

With the results here discussed flowing from the common law rule as to infants' rights, the question remains whether the Uniform Negotiable Instruments Law<sup>14</sup> has effected any change. That the infant is still not liable on the contract of endorsement is clear from the words of the statute.<sup>15</sup> As to the transfer of title, it has been argued by Mr. Ames in his controversy with Mr. Brewster that the statutory phrase "passes the property" could be construed to mean that an infant would not be allowed under the act to disaffirm the endorsement so as to revest title in himself.<sup>16</sup> Though both Mr. Brewster and Mr.

<sup>6</sup>Norton, *op. cit.* § 94; Story, *Promissory Notes* (7th ed.) § 80; Daniel, *op. cit.* § 228.

<sup>7</sup>Story, *op. cit.* § 80; Daniel, *op. cit.* § 228 and Norton, *op. cit.* § 94 quote Story.

<sup>8</sup>Transfers of property by an infant are in general voidable. Tiffany, *op. cit.* 389.

<sup>9</sup>By analogy to other property, real, *Miles v. Lingerman* (1865) 24 Ind. 385; *Brantley v. Wolf* (1882) 60 Miss. 420, and personal, *Hill v. Anderson* (1845) 13 Miss. 216; *Downing v. Stone* (1891) 47 Mo. App. 144, the infant's claim should be superior even to that of a *bona fide* purchaser. But see 2 Ames, *Cases on Bills & Notes*, 881. Possibly the basis for the latter view is the analogy between commercial paper and currency. Cf. *Stephens v. Board of Education* (1879) 79 N. Y. 183.

<sup>10</sup>Cf. *Smith v. Marsack* (1848) 6 C. B. \*486; see *Briggs v. McCabe* (1866) 27 Ind. 327; *contra*, see *Welch v. Welch* (1870) 103 Mass. 562.

<sup>11</sup>*French v. McAndrew* (1883) 61 Miss. 187; Tiffany, *op. cit.* §§ 216-7.

<sup>12</sup>*Wolke v. Kuhne* (1886) 109 Ind. 313, 10 N. E. 116; *McMann v. Walker* (1903) 31 Colo. 261, 72 Pac. 1055.

<sup>13</sup>*Tiedeman, op. cit.* § 49; Daniel, *op. cit.* § 228; Uniform Negotiable Instruments Law, § 60.

<sup>14</sup>§ 22 [N. Y. § 41] says: "The endorsement of the instrument . . . by an infant passes the property therein, notwithstanding that from want of capacity the infant may incur no liability thereon." It is to be noted that § 24 of the Uniform Sales Act is said to alter the infant's common law right to disaffirm sales as against *bona fide* purchasers from the infant's vendee. Williston, *Sales*, § 348.

<sup>15</sup>See note 14, *supra*.

<sup>16</sup>One phase of the famous controversy centred about § 22 [N. Y. § 41]. One authority, Norton, *op. cit.* 90, n. 72, maintains that Mr. Ames's view, Ames, *Negotiable Instruments Law*, 14 *Harvard Law Rev.* 247, 445, is

McKeehan opposed this view on the ground that the American Act was intended to follow in meaning the corresponding English provision,<sup>17</sup> it was not till the recent case of *Murray v. Thompson* (Tenn. 1916) 188 S. W. 578, that the question was presented for decision. There a note payable to plaintiff, a minor, was endorsed to defendant for value and without notice of the payee's infancy. The plaintiff dissipated the money received as consideration before payment by the maker to the defendant and thereupon brought an equitable action to recover the note. The court granted the relief sought, interpreting the section in question as giving the holder only a defeasible title against the infant. This seems clearly correct, since it is doubtful whether the framers of the act would have altered the prevalent doctrines of infancy without a more specific pronouncement. The decision lends weight to the view that § 22 [N. Y. § 41] is a mere codification of the common law rule that infants' endorsements are voidable,<sup>18</sup> and it is chiefly interesting for that reason. However, it has an added importance also in removing from the realm of untested theory the right of an infant to recover an instrument negotiated by him to a holder for value. That the court disregarded the non-repayment of the money consideration received is of no importance, since the Tennessee rule is that if the consideration has been squandered during infancy, the infant may disaffirm without a tender.<sup>19</sup>

**SPECIFIC PERFORMANCE OF CONTRACT TO EXECUTE TESTAMENTARY POWER OF APPOINTMENT.**—In the recent case of *Farmer's Loan & Trust Co. v. Mortimer* (1916) 219 N. Y. 290, 114 N. E. 389, the donee of a general testamentary power of appointment over a trust fund, after contracting to exercise the power in favor of the defendants, made an appointment in his last will in favor of his children. In proceedings brought by the trustees of the fund to settle their accounts, the court refused specific performance of the contracts on the ground that the limitation in the power was an effective bar to such relief. The case seems clearly correct; it bears only a superficial resemblance to cases where contracts to make a will of one's own estate have been specifically enforced, and to those where relief is granted because the donee of a power which is absolute and allows disposition by either deed or will is held to have the equivalent of a fee.<sup>1</sup> That a power,

shared by Mr. Crawford. But see note 4, *supra*; *contra* to Mr. Ames, see Brewster, A Defence of the Negotiable Instruments Law, 10 Yale Law Journal, 90; McKeehan, Negotiable Instruments Law, 50 American Law Register, 499 *et seq.*

<sup>17</sup>The Bills of Exchange Act (45 & 46 Vict. c. 61) sec. 22, § 2, provides that "an infant's endorsement entitles the holder to receive payment of the bill and to enforce it against any other party thereto". Since the "property" must "pass" under the English act, the particular words used in the American statute seem of no consequence.

<sup>18</sup>Since the case arose in the jurisdiction of *Roach v. Woodall*, *supra*, the court regarded the section as removing any doubt as to whether such endorsements were void or voidable. However, in this particular also the act caused no change.

<sup>19</sup>*Turney v. Mobile & Ohio R. R.* (1913) 127 Tenn. 673, 156 S. W. 1085; so also in equity. *Nichol & McGavock v. Steger* (1880) 74 Tenn. 393. This is the general though not uniform rule. *Tiffany, op. cit.* §§ 214-5.

<sup>1</sup>See notes 3, 5, 11, *infra*.